

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

v.

**No. CV 07-0899 WJ/LAM
CR 04-1553 WJ**

CHARLES ELLWOOD GWATHNEY,

Defendant/Movant.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendant/Movant Charles Ellwood Gwathney's *Affidavit* (Doc. 23), filed on April 7, 2007, which the Court construes as a motion to alter or amend the judgment under Rule 59(e). On March 4, 2008, Magistrate Judge Lourdes A. Martínez filed her *Proposed Findings and Recommended Disposition* (Doc. 20) (hereinafter "PF&RD"), recommending that Mr. Gwathney's *Motion Pursuant to § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody* (hereinafter "Motion")¹ (Doc. 1), *Motion for Evidentiary Hearing on Petitioner's 28 U.S.C. § 2255 Motion* (Doc. 5), *Motion Substantiating the Need for an Evidentiary Hearing* (Doc. 18), *Motion to Preserve Transcript of the April 6, 2005 Hearing on Motion to Produce Business Records of Western Union and Documents Seized in Defendant's Truck and Motion to Replace Defense Counsel* (Doc. 10), *Motion for Order to Produce and Obtain Transcript of the Hearing of April 6, 2005* (Doc. 13), and *Motion to Produce Grand Jury Transcript and Material* (Doc. 16) be denied. Since no objections to the PF&RD were filed within

¹Unless otherwise noted, all referenced documents are from Case No. CIV-07-0899.

the deadline for filing objections, an order and judgment adopting the PF&RD and dismissing the civil case with prejudice were entered on April 2, 2008. *See Order Adopting Magistrate Judge's Proposed Findings and Recommended Disposition (Doc. 20) (Doc. 21)* and *Judgment (Doc. 22)*.

Mr. Gwathney's *Affidavit* (Doc. 23) states that on March 24, 2008, he mailed a letter to the Court Clerk asking for a docket sheet, which he received on April 1, 2008, and was thus alerted to the PF&RD which had been filed in his case. Mr. Gwathney states: "I never recieved [sic] a copy of the [PF&RD] [and] I want to respond to the [PF&RD] but can not [sic] because I never recieved [sic] the report." He then asks the Court to send him a copy of the PF&RD and to extend the deadline for objections so that he may respond.

Mr. Gwathney's *Affidavit* (Doc. 23) is dated April 1, 2008, one day before the order and judgment adopting the PF&RD were entered, however, the *Affidavit* was not filed until April 7, 2008. The Court may, therefore, construe it as a motion to alter or amend the judgment under Rule 59(e). *See Warren v. American Bankers Ins. of Florida*, 507 F.3d 1239, 1244 (10th Cir. 2007) (a motion asking a court to reconsider a final decision can arise "under Fed. R. Civ. P. 59 . . . if filed *before or within ten days* following entry of the judgment") (emphasis added); *see also Roman-Nose v. N.M. Dep't of Human Servs.*, 967 F.2d 435, 437 (10th Cir. 1992) (*pro se* litigant's characterization of claim for relief not dispositive on the availability of the relief in federal court). The Court may grant such a motion to avoid manifest injustice. *See Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). Mr. Gwathney states that he did not receive a copy of the PF&RD, and did not have an opportunity to file timely objections to the PF&RD. The docket for this case reflects that the Court has Mr. Gwathney's correct address and that the PF&RD was mailed to him at that address. Nevertheless, considering that prison mail can be uncertain and that the *Affidavit*

(Doc. 23) was sworn to under penalty of perjury, the Court will allow another ten-day period to file objections. *See Summers v. Utah*, 927 F.2d 1165, 1168 (10th Cir. 1991) (remanding to the district court to consider objections that were not filed within the ten-day objection deadline).

IT IS THEREFORE ORDERED that:

1. The *Order Adopting Magistrate Judge's Proposed Findings and Recommended Disposition* (Doc. 20) (Doc. 21) and *Judgment* (Doc. 22) are withdrawn;
2. The Clerk of Court shall mail a copy of the *Proposed Findings and Recommended Disposition* (Doc. 20) and this Order to Mr. Gwathney; and
3. **Mr. Gwathney must file his objections to the *Proposed Findings and Recommended Disposition* (Doc. 20) within ten days of service of this Order and the accompanying *Proposed Findings and Recommended Disposition* (Doc. 20). If no objections are filed within that period, no appellate review will be allowed.**

IT IS SO ORDERED.



WILLIAM P. JOHNSON
UNITED STATES DISTRICT JUDGE